Supreme Court, U. S.
FILED
OCT 24 1980
MICHAEL RODAK, JR., CLERK

No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.,

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

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Questions Presented

1. Whether the Court below correctly concluded, consistent with all other decisions on the issue, that an employer held liable under the Equal Pay Act may not seek contribution from a union for that Equal Pay Act liability.

2. In the absence of any provision in Title VII of the Civil Rights Act of 1964 allowing for contribution, may an employer previously held liable under the Act maintain an independent action against a union for reimbursement for any portion of that Title VII liability where the union has never been named in a charge of discrimination filed with the Equal Employment Opportunity Commission, afforded any opportunity to conciliate, or named in a complaint or adjudicated liable in a Title VII action brought by an "aggrieved person"?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

Statutory Provisions

Pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, in which the Equal Pay Act of 1963, 29 U.S.C. § 206(d), is incorporated, and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, which were not included in the petition for certiorari, are set forth in Supplemental Appendix A, annexed hereto.

Statement of the Case

This case presents an attempt by Northwest Airlines, Inc. ("Northwest") to obtain contribution from the Air Line Pilots Association, International ("ALPA") and the Transport Workers Union of America ("TWU"), former collective bargaining representatives of flight attendants employed by Northwest, for Northwest's financial liability in *Laffey* v. *Northwest Airlines, Inc.*,[1] under two comprehensive, regulatory statutes—the Equal Pay Act of 1963 ("EPA")[2] and Title VII of the Civil Rights Act of 1964 ("Title VII")[3]—which do not contain a provision for contribution.

A. *The Underlying Title VII and EPA Litigation*

Laffey was commenced solely against Northwest, following the filing of charges of discrimination with the EEOC solely against Northwest. After trial, Northwest was held to have engaged in widespread violations of the EPA and Title VII against its female flight attendants, principally due to its differential treatment of "pursers" and "cabin attendants." From the inception of the purser position in 1947, Northwest unilaterally "adhered to an undeviating practice of restricting purser jobs to men alone." 567 F.2d at 437; 366 F. Supp. at 765 (¶6), 772-73 (¶37).[4] This "company policy," never contained in a collective bargain-

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[1] 366 F. Supp. 763 (D.D.C. 1973) and 374 F. Supp. 1382 (D.D.C. 1974), *aff'd in part and vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[2] 29 U.S.C. §206(d)(1).

[3] 42 U.S.C. §2000e-2(a).

[4] While Northwest explains this as "[i]n accordance with the maritime tradition" (NWA brief, p. 3), neither the District Court nor the Court of Appeals ascribed such a reason. 366 F. Supp. at 772 (¶37). The reason, instead, was very simple: "the company 'prefers males and intends to have them.'" 567 F.2d at 438; 366 F. Supp. at 778 (¶45).

ing agreement, "created a *status quo* under which pursers were more highly paid than stewardesses." 567 F.2d at 447. While Northwest asserts that "[i]t is unthinkable that the pay differential would have persisted as long as it did if the unions had protested the differential as discriminatory" (NWA brief, p. 38), in fact the Court of Appeals in *Laffey* found that union efforts "to win better treatment for stewardesses" met with "stiff resistance from NWA." 567 F.2d at 447.

B. *Northwest's Belated Attempts to Assert Claims Against the Unions*

No union conduct of any kind was held in *Laffey* to violate any law.[5] The sole liability determined was Northwest's. There was no suggestion of any alleged union misconduct—even after ALPA had been joined in the case at plaintiffs' request—until Northwest belatedly attempted to amend its answer to assert a cross-claim against ALPA for contribution "almost four years after the action was commenced, more than three years after NWA had answered the complaint, almost one and one-half years after trial was completed and several . . . months after the court rendered its findings and judgment." 567 F.2d at 477. The District Court rejected Northwest's untimely effort, and the Court of Appeals affirmed, emphasizing Northwest's extreme tardiness and the obvious "hardship on the parties" which would have followed from allowing Northwest to pursue its dilatory claims. 567 F.2d at 477-78.

After *Laffey* was appealed to the Court of Appeals, Northwest attempted to cure its long delay by filing the present action seeking contribution toward its liability

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[5] Northwest's extensive discussion in its "Statement" of alleged union conduct in negotiations is self-serving and inaccurate, and is unsupported by the record in this case. The *Laffey* findings, to which Northwest repeatedly refers, while binding on Northwest, cannot be offered against ALPA or TWU, since neither union participated in the trial of the case. *See* 567 F.2d at 476-78.

under the Equal Pay Act and Title VII in *Laffey*. The complaint identified no other alleged sources of union liability.

C. *The Decision of the District Court*

The District Court granted ALPA's motion to dismiss Northwest's claim for EPA contribution, citing the uniform judicial decisions rejecting such a claim. (P.A., pp. 4b-7b).[6] ALPA's motion to dismiss the claim for Title VII contribution was denied solely because the Court concluded that the federal common law provides a right to contribution applicable to Title VII liability, "at least under some circumstances." (P.A., p. 18b). The Court held that this "federal common law" provided jurisdiction under 28 U.S.C. § 1331. (P.A., p. 8b).

D. *The Decision of the Court of Appeals*

1. Equal Pay Act Contribution

The Court of Appeals affirmed the dismissal of Northwest's claim for Equal Pay Act contribution, "because we find such a right inconsistent with both the statute's language and purpose." 606 F.2d at 1353. (P.A., p. 6d). The Court emphasized that its "conclusion is also in accord with a persuasive and well-reasoned line of precedent." 606 F.2d at 1355. (P.A., p. 11d).

2. Title VII Contribution

The Court of Appeals found it premature—and perhaps ultimately unnecessary—to consider the claim for Title VII contribution because Northwest's possible laches might bar its claim. The Court remanded for consideration of laches, and indicated it would address the merits of the Title VII contribution claim if the District Court did not dismiss the claim for laches:

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[6] The decisions of the Courts below appear in the Appendix to the Petition, cited as "P.A."

"If the trial court finds that laches is not a bar, the defendants' appeal may be renewed." 606 F.2d at 1356. (P.A., p. 13d).

Before the District Court could proceed as directed to consider the laches question, Northwest petitioned this Court for review.

Summary of Argument

I

Northwest seeks contribution for its liability under Title VII and the Equal Pay Act. Neither statute, by its terms, provides for contribution. Northwest's inability to establish any statutory or constitutional basis for its claim requires dismissal of the action.

A. Federal courts are not common law tribunals. They may only fashion common law in limited areas pursuant to constitutional or statutory authorization. Where, as here, the suit is between private litigants and the claim presented directly involves federal statutes, the courts may only fashion rules of decision to the extent authorized by the particular statutes. A right to Title VII or EPA contribution must find its authorization in those statutes, or it does not exist.

B. Title VII and the EPA delineate specific means for their enforcement. The question of whether the statutes create additional enforcement mechanisms must be resolved on the basis of congressional intent, to be discerned in accordance with the guidelines set forth in *Cort* v. *Ash*, 422 U.S. 61 (1975) and its progeny.

II

The text and legislative histories of Title VII and the EPA demonstrate that Congress did not intend the courts to recognize an employer right of contribution against unions for liability under those statutes.

A. Congress has provided for contribution in other regulatory statutes. Its failure to so provide in Title VII and the EPA indicates congressional intent not to provide contribution for liability under the two statutes.

B. The text and legislative history of the EPA demonstrate that the statute bars private damage actions against unions for violations of the statute, whether by contribution or otherwise. The lower courts have unanimously agreed. Contribution for EPA liability would conflict with the EPA policy of discouraging unfair competition based on wage discrimination by allowing discriminatory employers to retain part of the benefits of their discriminatory practices.

C. Northwest's effort to establish the unions' Title VII liability by extra-statutory means contravenes the wording and intent of the exclusive statutory enforcement scheme. A critical component of the compromise that produced Title VII's enforcement scheme is the absolute requirement that all respondents be afforded the *opportunity* to conciliate prior to suit. All claims of Title VII violations must initially be referred to the Equal Employment Opportunity Commission. Title VII lawsuits may only be filed against "respondents" previously named in EEOC charges filed by aggrieved persons or the EEOC, and the power of the courts to remedy Title VII violations may only be exercised against such "respondents." The legislative history reflects that this enforcement scheme was to be the exclusive means of adjudicating Title VII liability, and this Court has consistently implemented that legislative intent.

D. Northwest's failure to satisfy Title VII's jurisdictional prerequisites requires dismissal of its claim for contribution for Title VII liability. Its attempt to invoke jurisdiction under 28 U.S.C. § 1331 by characterizing its action as a "common law" claim is without merit. Northwest's claim requires the establishment of the unions' Title VII liability. Title VII's limiting jurisdictional provisions preclude resort to the general jurisdictional grant in 28 U.S.C. § 1331.

E. Contribution for Title VII and EPA liability cannot be created by the courts on the basis of policy considerations. Such concerns are appropriately addressed, if at all, to Congress. Moreover, there are strong policy considerations against contribution. A denial of contribution will deter future wrongful conduct because a party will be unable to shift liability if it violates the law. Contribution against unions will discourage suits by aggrieved individuals—"private attorneys general"—because they will, as a practical matter, be forced to fund their own back pay awards through depletion of their unions' treasuries. Contribution will also discourage unions from undertaking affirmative efforts, including the filing of Title VII suits on behalf of their members, to eradicate discrimination, because the great costs of defending contribution claims, even if those claims prove unsuccessful, will divert the limited available resources from the pursuit of such efforts.

Contribution, as presented in this action, will deprive defendants of the basic "due process" protections which Congress specifically included in Title VII to assure fair treatment to all potential respondents, including the opportunity to conciliate claims of Title VII violations prior to possible litigation. Moreover, contribution would directly conflict with Title VII's requirement for the prompt assertion of claims of Title VII violations, particularly where, as here, a statutory violator has consciously delayed asserting any contribution claim until after the underlying statutory liabilities have already been determined.

F. Northwest's complaint seeks contribution solely for its liability under Title VII and the EPA. It would entirely subvert congressional intent to allow Northwest to bypass the bars to contribution under those statutes by invoking another source of possible underlying liability. Northwest's effort, if successful, would encourage widespread efforts by litigants to avoid statutory restrictions on claims by simply couching their claims as "common law" rights.

ARGUMENT

I.

A Right to Contribution for Liability Under Title VII or the Equal Pay Act May Be Judicially Established Only If Congress Intended to Create Such Right.

Northwest, in its capacity as a proven violator of Title VII and the Equal Pay Act, asserts a cause of action to recover contribution from other parties who allegedly participated in its misconduct. Since no statute expressly provides this cause of action, the claim raises a threshold question of what "recognized legal rights," if any, provide a basis for Northwest's "claim for relief." *Davis* v. *Passman,* 442 U.S. 228, 237 (1979).

Disclaiming an implied right to contribution under either statute (NWA brief, p. 11), Northwest characterizes contribution as a "federal common law right" (*id.,* p. 51), derived from "the developing law of remedies" (*id.,* p. 11), and presumably applicable to all federal liabilities. This approach fundamentally misconceives the law-making functions of the federal judiciary. The remedial powers of the court cannot be invoked unless "recognized legal rights" have been violated.[7] Northwest's inability to establish a

[7] *See Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 154 (1803); *Wheeldin* v. *Wheeler,* 373 U.S. 647, 651 n.5 (1963) (distinguishing

statutory or constitutional basis for its claimed right to contribution requires dismissal of this action.

A. *There Is No Federal Common Law From Which a Right to Contribution May Be Derived Independent of Statutory Authorization.*

Federal courts are fundamentally distinct from their state counterparts which function as common law tribunals. *See United States* v. *Standard Oil Co.*, 332 U.S. 301, 313 (1947).[8] Federal courts may only fashion "federal common

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the creation of federal common law rights from the fashioning of remedies).

In each of the cases cited by Northwest for "the power of the federal judiciary to supplement express remedies" (NWA brief, p. 12), the claim rested on "recognized legal rights." In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the source of rights was 42 U.S.C. §1982. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), involved the courts' implementation of the general substantive rule provided by §301 of the Labor Management Relations Act, 29 U.S.C. §185. *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967) and *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960), involved the implication of causes of action under the Rivers and Harbors Act of 1899, 33 U.S.C. §401 *et seq.* *See Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), involved direct authorization for judicial law-making from the Constitution, and *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), the judicial implication of remedies to effectuate substantive Fourth Amendment rights operative by their own force.

[8] The state court contribution cases cited by Northwest (NWA brief, App. A) are thus inapposite. Similarly, the cases cited in which federal courts have applied state common law rules of contribution have no bearing on the power of the courts to decide federal cases. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951) (Pennsylvania contribution rule applied in accordance with Federal Tort Claims Act); *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1967) (Virgin Islands Law); and *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942) (local District of Columbia common law). It should further be noted that despite the broad common law powers of state courts, in only ten jurisdictions (the District of Columbia, Iowa, Louisiana, Maine, Minnesota, Pennsylvania, Tennessee, Wisconsin, Illinois, Nebraska) was contribution initially adopted by judicial rather than legisative action.

(footnote continued on following page)

law" in limited, specialized areas where authorized by specific constitutional or statutory authorization.[9]

For example, the Constitution has been construed to authorize the development of federal common law to resolve interstate disputes,[10] and to enforce constitutional protections.[11] The Article III grant of admiralty jurisdiction, presently implemented by 28 U.S.C. §1333, has also been construed to empower courts to continue the centuries-old tradition of judge-made admiralty law.[12] The presence of federal governmental interests has been held to require the application of federal rules, *e.g.*, where "substantial rights or duties of the United States hinge on [the] out-

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(footnote continued from preceding page)
See W. Prosser, The Law of Torts, §50, 306-07 (4th ed. 1971); *Skinner* v. *Reed-Prentice Div. of Package Machinery Co.*, 70 Ill.2d 1, 374 N.E. 2d 437 (1977), *cert. denied*, 436 U.S. 946 (1978); *Royal Indemnity Co.* v. *Aetna Casualty & Surety Co.*, 193 Neb. 752, 229 N.W. 2d 183 (1975). The decision in *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 110 A.2d 24 (1954) (NWA brief, p. 12) applied a statutory contribution provision and did not judicially create a rule of contribution.

[9] *Wheeldin* v. *Wheeler*, *supra*, 373 U.S. 647. The Court has repeatedly recognized that apart from implementation of the Constitution and federal statutes, there is no common law of the United States. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law"); *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888); *Smith* v. *Alabama*, 124 U.S. 465, 478-79 (1887); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 621 (1838); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658 (1834). *See also United States* v. *Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

[10] *See, e.g., Illinois* v. *Milwaukee*, 406 U.S. at 103-107; *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Texas* v. *Pankey*, 441 F.2d 236, 240-41 (10th Cir. 1971).

[11] *Carlson* v. *Green*, 100 S.Ct. 1468 (1980); *Davis* v. *Passman*, *supra*, 442 U.S. 228; *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. 388.

[12] *See, e.g., Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 259, 271-272 (1979); *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952).

come," *Miree* v. *DeKalb County*, 433 U.S. 25, 31 (1977),[13] or where international relations[14] or title to Indian lands[15] are at stake.

In contrast, where private parties advance claims directly involving federal statutes, judicial authority to fashion rules of decision exists only to the extent authorized by the pertinent staute.[16]

This approach has been applied where contribution is sought for statutory liabilities, as demonstrated by the leading maritime contribution cases, *Halcyon Lines, supra*, 342 U.S. 282, and *Cooper Stevedoring Co., Inc.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974). Even though admiralty had recognized contribution since the twelfth century,[17] the Court in *Halcyon Lines* refused to permit contribution against a party whose liability was controlled by statute, where Congress had "stopped short of approving the rule of contribution. . . ." 342 U.S. at 287. In *Cooper Stevedor-*

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[13] *See, e.g., Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943). Even where the Court determines that federal rules must necessarily govern because government operations are at issue, it will decline to create any substantive rights or remedies where to do so would be contrary to congressional intent. *United States* v. *Standard Oil Co.*, 332 U.S. at 314-16.

In suits between private parties which do not substantially affect government interests, there is no such basis for the fashioning of federal common law. *Bank of America Nat'l. Trust and Savings Ass'n.* v. *Parnell*, 352 U.S. 29, 33 (1956); *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966).

[14] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423-27 (1964).

[15] *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666-75 (1974).

[16] *See Textile Workers* v. *Lincoln Mills*, 353 U.S. at 457; *Wheeldin* v. *Wheeler*, 373 U.S. at 651-52.

[17] In contrast, a right to contribution was not recognized at common law. *Union Stock Yards Co.* v. *Chicago B & Q R. Co.*, 196 U.S. 217, 224 (1905); *Halcyon Lines*, 342 U.S. at 285. *See also Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614, 616 (3d Cir. 1960).

ing, the Court reaffirmed that it would be improper to allow contribution even in admiralty where there is any "possibility" that "contribution might be inconsistent" with a statute. 417 U.S. at 112. *See Edmonds,* 443 U.S. at 273.[18]

Similarly, a "right" to Title VII or EPA contribution must find its authorization in those statutes, or it does not exist. *EEOC* v. *Ferris State College,* 23 FEP Cases 434, 442 (W.D.Mich. 1980) ("If the [EPA] itself confers no right of contribution favoring employers, then no such right exists under federal common tort law. . . .")

B. *A Statute Cannot Be Found to Authorize Contribution If Congress Did Not Intend to Create Such a Right.*

Title VII and the EPA delineate substantive rules and the means for enforcement. Neither provides for contribution. Whether these statutes authorize the courts to recognize additional enforcement mechanisms must be determined in accordance with the guidelines established in *Cort* v. *Ash,* 422 U.S. 66 (1975) and its progeny. *Davis* v. *Passman,* 442 U.S. at 241. Under these guidelines, "the dispositive question remains whether Congress intended to create any such remedy." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 24 (1979); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568 (1979).[19]

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[18] No statutory duties or liabilities were involved in *Kohr* v. *Allegheny Airlines, Inc.,* 504 F.2d 400 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975) (NWA brief, p. 14). The only possible rationale for the fashioning of a federal rule of contribution in *Kohr* for aircraft disasters was the overriding interest of the federal government in the regulation of matters pertaining to interstate air space and the presence of the government as a party. Even as so construed, *Kohr* appears to have been wrongly decided in light of this Court's subsequent decision in *Miree* v. *DeKalb,* 433 U.S. at 31-32.

[19] The question of supplementing a statutory enforcement scheme is entirely different from the issue presented in *Textile Workers* v. *Lincoln Mills, supra,* 353 U.S. 448, where the statute under consideration provided a general substantive rule, but left to the courts the task of providing specific mechanisms to implement that rule. Nevertheless, the critical consideration remains the same in

The cases have identified several indicia bearing on the determination of legislative intent. First, and most obviously, the question of statutory construction begins "by looking to the language of the statute itself." *Cannon,* 441 U.S. at 689 (1979). A second indicium is whether Congress has expressly provided in other legislation for the specific right or remedy not expressly found in the statute under consideration. If it has, then it is unlikely that Congress intended to imply such a right or remedy in the silent statute.[20] Such silence is especially significant where the federal decisional law at the time of the enactment of the statute has refused to recognize the right or remedy in question in the absence of statutory provision.[21] A third consideration is the comprehensiveness of the underlying statute. The enactment of a detailed statutory scheme, specifying rights and remedies, and the means by which they are to be determined, generally indicates that Congress did not intend to create an additional right or remedy. *Transamerica,* 444 U.S. at 19. Another indicator is whether the party seeking relief is "one of the class for whose *especial* benefit the statute was enacted." *Cort,* 442 U.S. at 78, *quoting Texas & Pacific R. Co.* v. *Rigsby,* 241 U.S. 33, 39 (1916). Where the party asserting the claim is within the class whose conduct Congress intended to regulate by the statute at issue, congressional intent to confer rights or remedies upon that party cannot be inferred. *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 37 (1977).

Where congressional intent cannot be readily ascertained, and the party seeking relief is not one of the "especial" intended beneficiaries, "the inquiry ends there,"

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both situations: whether Congress authorized the courts to fashion the rules which the plaintiff is seeking.

[20] *Touche Ross,* 442 U.S. at 572; *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 247, 263-64, 269 (1975). *See Rogers* v. *Exxon Research & Engineering Co.,* 550 F.2d 834, 841 (3d Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978).

[21] *See Edmonds,* 443 U.S. at 273-74 n.32.

Touche Ross, 442 U.S. at 576, and the relief cannot be granted.[22] Even if the party can establish its status as an "especial" intended beneficiary, the right it seeks will not be implied unless it is "necessary to effectuate Congress' goals." *Piper,* 430 U.S. at 26.[23]

As discussed below, the structure and legislative history of the EPA and Title VII confirm that Congress did not intend to provide a right of contribution for enforcement of liabilities under those statutes.

II.

There Is No Basis for Contribution for Title VII or Equal Pay Act Liability.

Title VII and the EPA, unlike certain other statutes regulating private federal conduct, provide comprehensive schemes defining unlawful conduct and delineating exclusive means for enforcement. Neither statute provides for contribution. Contribution would be inconsistent with the text and legislative history of the statutes, and must therefore be rejected.

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[22] *Touche Ross,* 442 U.S. at 579-80 (Brennan, J., concurring) ("when, as here, a statute clearly does not 'create a federal right in favor of the plaintiff,' . . . i.e., when the plaintiff is not 'one of the class for whose *especial* benefit the statute was enacted,' . . . and when there is also in the legislative history no 'indication of legislative intent, explicit or implicit, . . . to create such a remedy,' . . . the remaining two *Cort* factors cannot by themselves be a basis for implying a right of action.") (citations omitted).

[23] To the extent *J.I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), may be read to suggest that a right may be implied simply by demonstrating that it "provides a necessary supplement" to the statutory enforcement scheme, the Court has indicated that this is no longer the applicable standard:

> 'in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action." *Touche Ross,* 442 U.S. at 578.

See Cannon, 441 U.S. at 698; *Transamerica,* 444 U.S. at 15-16.

A. *The Absence of Provisions for Contribution in Title VII and the Equal Pay Act Demonstrates Congressional Intent Not to Provide for Contribution for Liabilities Under Those Statutes.*

The clearest indication that Congress did not intend contribution to be available to violators of Title VII or the EPA is that neither statute provides for contribution.

Congress has specifically provided for contribution among joint statutory violators where it believes contribution is necessary and appropriate, as it has in the Federal Securities Acts.[24] These specific provisions demonstrate that "when Congress wished to provide" a right of contribution, "it knew how to do so and did so expressly." *Touche Ross,* 442 U.S. at 572. The absence of such provisions in other federal regulatory schemes is therefore significant: "no such right should be implied." *Sabre Shipping Corp.* v. *American President Lines, Ltd.,* 298 F.Supp. 1339, 1345 (S.D.N.Y. 1969). Accordingly, contribution has been denied for liability arising under the Federal Motor Vehicle Information and Cost Savings Act,[25] the Consumer Credit

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[24] Section 11(f) of the Securities Act of 1933, 15 U.S.C. §77k(f), and Sections 9(e) and 18(b) of the Securities and Exchange Act of 1934, 15 U.S.C. §§78i(e), r(b). The explicit provision for contribution has led courts to allow contribution in cases involving implied liabilities under the securities laws, as in three of the "federal conrtibution" cases cited by Northwest. *Heizer Corp.* v. *Ross,* 601 F.2d 330, 332 (7th Cir. 1979) ("when it occurred to Congress to do so, it expressed its desire that contribution be available among joint securities tortfeasors."); *Gould* v. *American-Hawaiian Steamship Co.,* 387 F. Supp. 163, 168-69 (D. Del. 1974), *vacated and remanded on other grounds,* 535 F.2d 761 (3d Cir. 1976); *Globus, Inc.* v. *Law Research Service, Inc.,* 318 F. Supp. 955, 958 (S.D.N.Y. 1970), *aff'd per curiam,* 442 F.2d 1346 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971). *See also Wassel* v. *Eglowsky,* 399 F. Supp. 1330 (D. Md. 1975), *aff'd,* 542 F.2d 1235 (4th Cir. 1976).

[25] 15 U.S.C. §§1901 *et seq.* *See Mataya* v. *Behm Motors, Inc.,* 409 F.Supp. 65, 70 (E.D.Wisc. 1976); *Stier* v. *Park Pontiac, Inc.,* 391 F.Supp. 397, 401 (S.D.W.Va. 1975).

Protection Act,[26] the Interstate Commerce Act,[27] and the antitrust laws.[28]

Congressional failure to provide for contribution in statutes enacted after the Securities Acts, like Title VII and the EPA, is particularly significant,[29] because the state of decisional federal law at the time the statutes were enacted did not recognize a right of contribution.[30] The absence of contribution provisions in Title VII and the EPA must be viewed as a purposeful decision to bar contribution, and is dispositive of Northwest's claim.

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[26] 15 U.S.C. §§1601 *et seq.* *See McCain* v. *Clearview Dodge Sales, Inc.*, 574 F.2d 848 (5th Cir. 1978).

[27] 49 U.S.C. §§301 *et seq.* *See Carriers Insurance Exchange* v. *Truck Insurance Exchange*, 310 F.2d 653, 657-59 (4th Cir. 1962).

[28] *See, e.g., Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. ¶62,995, *en banc rehng. granted* (10th Cir. Dec. 21, 1979); *Sabre Shipping, supra*, 298 F.Supp. 1339; *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. ¶61,533 (N.D.Cal. 1976); *Baughman* v. *Cooper-Jarrett, Inc.*, 391 F.Supp. 671, 678 n.3 (W.D.Pa. 1975), *aff'd and modified on other grounds*, 530 F.2d 529 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976). *Contra, Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (8th Cir. 1979).

[29] *Glus* v. *G.C. Murphy Co.*, 23 FEP Cases 86, 99-100 (3d Cir. 1980) ("Glus II") (Sloviter, J., dissenting).

[30] *Halcyon Lines*, 342 U.S. at 285. Knowledge of the state of the law is attributable to Congress, *see Cannon*, 441 U.S. at 696-98; *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978), and Congress is presumed to have acted in contemplation of the then existing state of the law. *Edmonds*, 443 U.S. at 273-74 n.32. Assuming *arguendo* that the state of the federal law of contribution has changed since the enactment of Title VII and the EPA, it would be entirely inappropriate to retroactively attribute to Congress an intent, by its silence, to recognize a right which did not then exist. *See Simpson* v. *Reynolds Metals Co.*, 23 FEP Cases 868, 880 (7th Cir. 1980).

B. *The Text and Legislative History of the Equal Pay Act Bar Contribution.*

Congress' decision to incorporate the EPA into the comprehensive enforcement scheme of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.*, demonstrates that it did not intend to subject unions to claims for contribution by discriminatory employers. The lower courts have uniformly held that the EPA precludes any private damage actions against unions.

1. The Statute Precludes Private Damage Claims Against Unions for EPA Liability.

The FLSA provides several distinct enforcement mechanisms, some generally applicable to all "persons" who violate the Act, others applicable only to "employers."

The statute vests the Administrator of the Wage and Hour Division of the Department of Labor[31] with authority to investigate any industry covered by the Act "to determine whether any *person* has violated any provision of this chapter" (emphasis added).[32] The Secretary of Labor is granted exclusive authority to sue to enjoin violation of the Act,[33] and "may bring an action . . . to recover . . . wages or unpaid overtime compensation[34] and an additional equal amount as liquidated damages." [35] The Department of Jus-

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[31] Pursuant to Section 1 of Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807, 92 Stat. 3781, the statutory functions and powers described in the text relating to enforcement of the Equal Pay Act by the Secretary of Labor have been transferred to the Equal Employment Opportunity Commission.

[32] 29 U.S.C. §211(a).

[33] *Id.*

[34] "For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection [the Equal Pay Act] shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter." 29 U.S.C. §206(d)(3).

[35] 29 U.S.C. §216(c).

tice may institute criminal proceedings against "[a]ny *person* who willfully violates," *inter alia,* the Equal Pay Act. 29 U.S.C. §216(a) (emphasis added).

Section 216(b)—the only section of the FLSA providing for civil enforcement by private parties—authorizes "employees" to bring actions to recover "unpaid minimum wages" or "unpaid overtime compensation," an "additional equal amount as liquidated damages," and "reasonable attorney's fee to be paid by the defendant." [36] Unlike the criminal proceedings of Section 216(a) and suits for injunctive relief by the Secretary, private employee actions may be brought solely against employers:

> "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected. . . . An action to recover [such] liability . . . may be maintained against any *employer* (including a public agency)[37] in any Federal or State court of competent jurisdiction by any one or more employees. . . ." 29 U.S.C. §216(b) (emphasis added).

The use of the term "employer"—rather than "person"—in Section 216(b) is highly significant. The FLSA "is carefully drawn and every term is used as a term of art." *Bowe* v. *Judson C. Burns,* 137 F.2d 37, 38 (3d Cir. 1943). "Person" is defined to include "any organized group of per-

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[36] The statute limits this right of action. The right terminates upon the filing of a complaint by the Secretary of Labor. 29 U.S.C. §§216(b), (c). Moreover, an employee can only become a party plaintiff after first filing a written consent with the court. 29 U.S.C. §216(b).

[37] Congress added the phrase "against any employer (including a public agency)" in 1974, Fair Labor Standards Amendments of 1974, Pub.L.No. 93-259, §6(d)(1), 88 Stat. 61, confirming that the provisions of subsection 216(b) are limited exclusively to actions against employers.

sons" [38] and, hence, unions.[39] The term "employer" includes unions only when they also are employers.[40] Therefore, unions are not subject to private damage actions for EPA violations.

Where, as in the FLSA, Congress has carefully delineated the exclusive means of enforcement of statutory liabilities and the available remedies, "a court must be chary of reading others into it." *Transamerica*, 444 U.S. at 19.[41]

2. The Courts Have Uniformly Concluded That the EPA Does Not Subject Unions to Private Damage Claims for Equal Pay Act Liability.

The comprehensiveness of the EPA has led courts to unanimously reject employer contribution claims.[42] As the court below observed:

"The statutory scheme of enforcement is comprehensive and by omission, it insulates unions from suits by

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[38] 29 U.S.C. §203(a).

[39] *Bowe* v. *Judson C. Burns*, 137 F.2d at 39.

[40] 29 U.S.C. §203(d). The legislative history of the EPA demonstrates that "[t]he definitions and interpretations of the FLSA apply. These have been court tested and are generally understood by business and labor." H.R. Rep. No. 309, Supplemental Views, 88th Cong., 1st Sess. 8, *reprinted in* (1963) U.S. Code Cong. & Ad. News 687, 690. *Accord*, 109 Cong. Rec. 9195 (1963) (Rep. Frelinghuysen).

[41] *See National Railroad Passenger Corp.* v. *National Ass'n. of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[42] *Denicola* v. *G.C. Murphy Co.*, 562 F.2d 889, 894-95 (3d Cir. 1977). ("The Act evidences absolutely no Congressional intent to make a union liable either to an employee or an employer . . . . the statute has left no interstices with regard to the rights and liabilities of the various parties. . . ."); *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1063 (S.D.N.Y. 1975) ("The Fair Labor Standards Act of 1938 provides for its enforcement through both civil and criminal actions by specified parties. . . . [T]here seems no need to supplement the statute with an additional remedy which Congress did not see fit to provide"); *EEOC* v. *Ferris State College*, 23 FEP Cases at 437-38; *Usery* v. *Beloit College*, 12 E.P.D. ¶11,203 (W.D. Wisc. 1976); *Marshall* v. *Tombs Janitorial Service*, 82 L.C. ¶33,559 (W.D.Mo. 1977).

> employees. This statutory protection would certainly be frustrated by a declaration that an *employer* could recover from a union, once that employer had been found liable to its employees." 606 F.2d at 1355 (P.A., pp. 9d-10d).

Similarly, the courts have uniformly declined to recognize an implied cause of action in favor of employees against unions.[43] Because common liability to the affected employees is an indispensable element of a claim for contribution (NWA brief, p. 13), Northwest's claim for EPA contribution must fail.[44]

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[43] *Cook* v. *Mountain States T & T Co.*, 12 FEP Cases 979, 986 (D. Ariz. 1975); *Tuma* v. *American Can Co.*, 367 F. Supp. 1178, 1181 (D.N.J. 1973); *Hunter* v. *United Air Lines*, 10 FEP Cases 787, 788 (N.D.Cal. 1975); Decision of District Court below (P.A., p. 7b).

[44] Northwest erroneously cites three lower court decisions as demonstrating that unions and employers share equal monetary responsibilities under the EPA. *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371, 374 (D.Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Jt. Board*, 462 F.2d 180 (4th Cir. 1972), awarded the Secretary of Labor monetary relief against a union based *solely* on its outrageous conduct in insisting that an employer divert to its male employees part of the back pay which it had agreed to provide to female victims of discrimination. The courts have consistently refused to read *Sagner* as support for an employer right to contribution against unions. Decision below, 606 F.2d at 1356 (P.A., p. 11d); *Denicola* v. *G.C. Murphy*, 562 F.2d at 894; *EEOC* v. *Ferris State College*, 23 FEP Cases at 441-42; *Brennan* v. *Emerald Renovators*, 410 F. Supp. at 1062. Moreover, the Department of Labor, in spite of its recovery in *Sagner*, has consistently taken a position against recognition of a right of employer contribution. Copies of Department of Labor briefs in other litigation were annexed to ALPA's brief to the Court of Appeals below.

Sinyard v. *Foote & Davies Div. of McCall Corp.*, 577 F.2d 943 (5th Cir. 1978), does not address any issue as to monetary remedies against unions under the EPA.

Finally, *Dunlop* v. *Beloit College*, 411 F. Supp. 398 (W.D. Wisc. 1976), cuts entirely against Northwest's position. In a subsequent decision in the same litigation the court held that an employer has no right of contribution for EPA liability. *Usery* v. *Beloit College*, 12 E.P.D. at 5536.

(Footnote continued on following page)

3. The Legislative History of the EPA Demonstrates That Congress Did Not Intend to Subject Unions to Private Damage Claims for EPA Liability.

The legislative history of the EPA confirms that, contrary to Northwest's contentions, Congress did not "absentmindedly" forget to subject unions to private damage actions. *Transamerica,* 444 U.S. at 20.

The equal pay bills introduced, but not enacted, in 1961[45] and 1962,[46] provided an enforcement scheme independent of the FLSA with monetary penalties uniformly applicable to employers and unions.[47] The bill passed by Congress in 1963, H.R. 6060, 88th Cong., 1st Sess. (1963), discarded the entire enforcement scheme of the 1962 bill and incorporated the equal pay provisions into the statutory scheme of the FLSA. This change resulted in (1) the *elimination* of provisions subjecting union violators to monetary liability and (2) the addition of a private right of action in employees for back pay and liquidated damages, but against employers only.[48]

(Footnote continued from preceding page)

Contrary to Northwest's claim (NWA brief, p. 27 n.17), nothing in *EEOC* v. *Air Line Pilots Association,* 489 F. Supp. 1003 (D. Minn. 1980), suggests that unions are liable for *private* damage claims under the FLSA. The court grounded liability under Section 7 of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §626(b), which it concluded provided broader relief than that available under the FLSA.

[45] S. 2494, 87th Cong., 1st Sess. (1961).

[46] H.R. 11677, 87th Cong., 2d Sess. (1962).

[47] Section 6 of the 1962 bill expressly provided for "payment of back wages plus an additional amount . . . as may be appropriate" by all violators, including unions. 108 Cong. Rec. 14765-66 (1962).

[48] The 1962 bill provided for enforcement of the statute only through suit by the Secretary of Labor, and did not authorize any private right of action by employees. *See* H.R. 11677, 87th Cong., 2d Sess.; 108 Cong. Rec. 14765-66 (1962) [setting forth text of House bill]. Thus, contrary to Northwest's contention (NWA brief, p. 25), Congress *never* considered provisions subjecting unions to private actions for back pay.

Notwithstanding these changes, Northwest contends that "Congress, however, assumed that when the new Equal Pay Act merged into the FLSA . . . unions as well as employers would become subject equally to all the remedies that had been available to aggrieved employees under the FLSA." NWA brief, p. 26. However, the floor debates following introduction of H.R. 6060 confirm that Congress did not assume that the courts would enforce the EPA in a manner inconsistent with the express provisions of the FLSA.[49] Instead Congress clearly intended that the EPA would be enforced in precisely the same manner as the FLSA,[50] and deliberately chose to restrict the remedies for EPA violations to those provided by the FLSA.[51]

Congress was aware that the FLSA enforcement scheme treated employers and unions differently. For example,

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[49] Congress viewed incorporation into the FLSA as a significant change from the prior bills. As Rep. Griffith stated, "[t]he proposal . . . that the legislation should be an amendment to the Fair Labor Standards Act was a very major difference. . . ." 109 Cong. Rec. 9197 (1963). The change was significant not only from the standpoint of "[a]dministrative efficiency" 109 Cong. Rec. 8916 (1963) (Sen. Randolph), but also because it would enable the application of all the definitions, judicial and administrative interpretations, and enforcement mechanisms, penalties and remedies of the FLSA, which had been "court tested and . . . generally understood by business and labor.'" 109 Cong. Rec. 9195 (1963) (Rep. Frelinghuysen).

[50] Rep. Goodell, a principal proponent of the bill as enacted, also supported this position. 109 Cong. Rec. 9198 (1963). *See also* 109 Cong. Rec. 9207 (1963) (Rep. Carey); *id.* at 9212 (Rep. Ryan); and *id.* at 9203 (Rep. Roosevelt).

[51] *See, e.g.*, 109 Cong. Rec. 9195 (1963) ("The effect of the bill is to give *employees* who would be entitled to receive equal pay treatment under it the *same remedies* which are prescribed for workers in relation to minimum wage and overtime payments required by the Fair Labor Standards Act.") (Rep. Powell) (emphasis added); *id.* at 9204 ("This bill [H.R. 6060] does not extend the coverage of the Fair Labor Standards Act *nor does it prescribe additional penalties to those that are covered in that law.*" (Rep. Pepper) (emphasis added).

Rep. Goodell, a sponsor of the 1963 EPA legislation, reviewed the remedies for employer violations:

> "The employee or the Secretary [of Labor] would have to go to court, and the court would have to decide that there has been a violation. The Labor Department may get an injunction against an *employer* to eliminate the violation. If the employee sues the *employer* under one section of the Fair Labor Standards Act he may be able to recover double the wage differential involved." 109 Cong. Rec. 9208 (1963) (emphasis added).

His description of various remedies for union misconduct significantly omitted any reference to monetary liability:

> "[I]n a situation where an employer is bound by an existing agreement as to a wage differential [and the] Labor Department and the courts say that agreement violates this act . . . this bill as now written obligates the union . . . and gives the Secretary of Labor, if necessary, the power to enjoin not only the employer but the union, to sit down and negotiate and eliminate the discrimination in violation of this act." 109 Cong. Rec. 9209 (1963).

The Congressional debates refer to private employee suits only against employers.[52]

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[52] *See, e.g.*, 109 Cong. Rec. 9196 (1963) (Rep. Frelinghuysen); *id.* at 9215 (Rep. May). The remarks of Rep. Griffin of Michigan, who had proposed the inclusion of the union prohibition in the 1962 bill, further illustrate Congressional awareness that H.R. 6060 would not treat union violators like employers:

> "I want to focus attention on . . . an amendment which I offered [to the 1962 bill] to prohibit labor organizations from causing or attempting to cause an employer to discriminate in violation of the act. We have a provision in this bill [H.R. 6060] along those lines. *It may not be as strict as some would like,* but it does clearly prohibit labor organizations from causing or attempting to cause an employee [sic] to violate

4. Contribution Conflicts With Important EPA Policy.

As stated in the EPA's Declaration of Purpose, Congress viewed wage differentials based on sex as enabling discriminatory employers to obtain an unfair competitive advantage:

> "The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—
>
> (1) depresses wages and living standards for employees necessary for their health and efficiency;
>
> • • •
>
> (5) constitutes an unfair method of competition." [53]

If a discriminatory employer could offset its own liability through contribution, it would, in effect, retain a portion of

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the provisions of the act." 109 Cong. Rec. 9198 (1963) (emphasis added).

In support of its position, Northwest cites a statement of Rep. O'Hara that union violators "would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act." 109 Cong. Rec. 9209 (1963) (NWA brief, p. 26). Neither this statement, nor Rep. Thompson's (NWA brief, p. 26), suggests any intent to subject unions to liabilities other than those specifically contained in the statute. *Compare* Rep. Thompson's statement at 109 Cong. Rec. 7223 (1963) ("The prohibition against discrimination solely on the basis of sex is enforceable *to the same extent* that minimum wage and maximum hours are enforceable under fair labor standards, and *by the same people.*" (emphasis added)). Since the FLSA does not provide for union liability to private parties, no such liability exists.

[53] Equal Pay Act of 1963, Pub.L. 88-38, Sec. 2(a), 77 Stat. 56, *reprinted in* (1963) U.S. Code Cong. & Ad. News 59; *see* 29 U.S.C. §202(a)(3). These findings are also reflected in the floor debates on both the 1962 and 1963 bills. *See, e.g.*, 108 Cong. Rec. 10503 (1962) (Rep. Sullivan); *id.* at 14748 (Rep. Zelenko); *id.* at 14752-53 (Rep. Dwyer); *id.* at 14753 (Rep. May); *id.* at 14756 (Rep. Bailey); *id.* at 14757 (Rep. Daniels); *id.* at 22084 (Sen. McNamara); 109 Cong. Rec. 9203 (1963) (Rep. Daniels); *id.* at 9204 (Rep. Rivers); *id.* (Rep. Toll); *id.* at 9207 (Rep. Staggers).

the illegal wage differential and thereby secure an improper competitive advantage over non-discriminatory employers, whom Congress specifically intended to protect.[54] Thus, recognition of contribution would be entirely incompatible with congressional policy.

In sum, the express provision of the EPA, its legislative history, and the policies embodied in the Act all negate any finding that Congress intended to subject unions to claims for contribution. Accordingly, no such claim can be judicially created.

C. *The Text and Legislative History of Title VII Bar Contribution.*

1. Congress Intentionally Limited the Means by Which Title VII May Be Enforced.

Following "tempestuous legislative proceedings," Congress adopted an explicit scheme for enforcement of Title VII which "was clearly the result of compromise." *Mohasco Corp.* v. *Silver*, 100 S.Ct. 2486, 2493 (1980). "Cooperation and voluntary compliance were selected as the preferred means" for eliminating discrimination. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).[55]

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[54] As the Court below noted, "[t]he Act's focus on unfair competition explains the existence of a greater battery of deterrents against employer-violators than against unions who participate in the breach." 606 F.2d at 1355. (P.A., p. 10d). *Accord, EEOC* v. *Ferris State College*, 23 FEP Cases at 441; *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. at 1061; *Usery* v. *Beloit College*, 12 E.P.D. at 5535-36. *See also Wirtz* v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968).

[55] This followed the approach of the many fair employment practice bills introduced in Congress between 1947 (Ives-Fulton bill, S.984, H.R. 2824, 80th Cong., 1st Sess.) and 1964, which recognized that efforts to eliminate discrimination involved sensitive issues, 93 Cong. Rec. 2688 (1947) (Sen. Ives), which could be more effectively dealt with initially by informal, voluntary procedures. H.R. Rep. No. 1370, 87th Cong., 2d Sess. 6 (1962), accompanying H.R. 10144, which in substantial part became Title VII of the omnibus Civil Rights Bill (H.R. 7152); 110 Cong. Rec. 2602 (1964) (Rep. Dent.); 110 Cong. Rec. 6549 (1964) (Sen. Humphrey).

Title VII's "integrated, multistep enforcement procedure" [56] begins with the filing of a charge of discrimination with the EEOC, or appropriate state agency,[57] "by or on behalf of a person claiming to be aggrieved, or by a member of the [EEOC]." [58] The charge notifies a charged party of the nature of alleged discrimination, and "trigger[s] the investigatory and conciliatory procedures of the EEOC." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970).[59] The EEOC has the responsibility of investigating the charge and, where there is reasonable cause to believe a statutory violation is present, of attempting "to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." [60]

Federal court actions to enforce Title VII may not be commenced until 180 days following the filing of an EEOC charge, unless the EEOC has previously dismissed the charge.[61] Title VII actions may only be filed "against the respondent named in the charge," [62] and must be limited "to the 'scope' of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimi-

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[56] *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977).

[57] Section 706(b), (c), 42 U.S.C. §2000e-5(b), (c).

[58] Section 706(b), 42 U.S.C. §2000e-5(b).

[59] The charge thus plays a critical, substantive role in the statutory scheme. *Travers* v. *Corning Glass Works*, 76 F.R.D. 431, 433 (S.D.N.Y. 1977); *Peterson* v. *Lehigh Valley District Council*, 453 F.Supp. 735, 740 (E.D.Pa. 1978).

[60] Section 706(b), 42 U.S.C. §2000e-5(b).

[61] Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1). The time period before which suit can be commenced is extended an additional sixty days when the charge has been filed in a state prohibiting the alleged unlawful discrimination. *Id.*

[62] *Id.* The filing requirement, which triggers the "opportunity" for conciliation, is an absolute jurisdictional prerequisite to the filing of a Title VII action. *See* discussion at Point II-D, *infra*.

nation." *Sanchez,* 431 F.2d at 466.[63] The "plenary" powers of the Court to remedy Title VII violations (NWA brief, p. 13), are provided by Section 706(g) of the Act, and may only be exercised against "respondents." [64]

Thus, Title VII "creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights." *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 457-58 (1975). The legislative history confirms that Congress intended this enforcement scheme to be the exclusive means of enforcing Title VII's prohibitions:

> "The procedures set up in Title VII are the *exclusive* means of relief against those practices of discrimination which are forbidden as unlawful employment practices by sections 704 and 705 [§§703 and 704, as enacted]." 110 Cong Rec. 7207 (1964) (Justice Department Memorandum introduced by Sen. Clark).[65]

The statute sets forth "the exact procedures to be followed. . . ." 110 Cong. Rec. 7420 (1964) (Sen. Humphrey). Any effort to establish Title VII liability by other means would contravene both the text and the legislative history of the statute.

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[63] *Accord, Tipler* v. *E.I. duPont de Nemours & Co.,* 443 F.2d 125, 131 (6th Cir. 1971).

[64] Under Section 706(g), 42 U.S.C. §2000e-5(g), remedies may be awarded only "[i]f the court finds that the *respondent* has intentionally engaged in or is intentionally engaging in an unlawful employment practice. . . ." (emphasis added). The term "respondent" is defined as the "employer, employment agency, labor organization, or joint labor-management committee" identified in an EEOC charge as having engaged in an unlawful employment practice. Section 706(b), 42 U.S.C. §2000e-5(b).

[65] While Northwest cites this same memorandum for the proposition that unions were intended to be subject to the same monetary sanctions as employers (NWA brief, p. 17 and n.10), it ignores the memorandum's emphasis on the exclusivity of means to establish union liability—the same exclusive machinery applicable to employers.

2. Congress Did Not Authorize Discriminatory Employers to Establish Union Title VII Liability.

Northwest has attempted to justify its present effort to supplement Title VII's enforcement mechanisms against unions by arguing that "[u]nion members will surely be reluctant to take on their own unions if they can avoid a direct confrontation." NWA brief, p. 35. Congress carefully considered who could establish Title VII violations, and specifically addressed the concern raised by Northwest. The "solution" *that Congress adopted* was to allow charges to be filed by the EEOC, in addition to individual employees:

> "This provision of the bill [authorizing a member of EEOC to file a complaint] is an effective one in connection with the proper operation of an equal employment opportunity commission, as we have found in the course of our experience in New York. For example, a union member may not wish to complain about his union, although a member of the Commission would feel free to do so." 110 Cong. Rec. 14191 (1964) (Sen. Javits).[66]

Significantly, when Congress amended Title VII in 1972, it expanded the class of individuals who might enforce Title VII by allowing charges to be filed "on behalf of a person claiming to be aggrieved," [67] and by granting the EEOC authority to bring Title VII actions.[68] No "cause of action" was granted to discrimintary employers to adju-

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[66] *See* 110 Cong. Rec. 14188 (1964) (Sen. Case), emphasizing that filing of charges by the EEOC was the means selected for overcoming any "intimidation" of aggrieved individuals which might otherwise prevent the filing of charges.

[67] Section 706(b), 42 U.S.C. §2000e-5(b) (1972).

[68] Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1) (1972).

dicate the Title VII liability of unions; none can be inferred.[69]

3. Title VII Liability Cannot Be Established by Extra-Statutory Means.

The Court, consistent with the text and legislative history of Title VII, has emphasized the importance of respecting the exclusivity of the scheme embodied in Title VII.[70] In *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975), the Court refused to allow claims of conduct allegedly violative of Section 704(a) of Title VII, 42 U.S.C. §2000e-3, to be presented to the National Labor Relations Board:

> "Questions arising under Title VII must be resolved by the means that Congress provided for that purpose. . . . What is said above does not call into question either the capacity or the propriety of the [NLRB's] sensitivity to questions of discrimination. It pertains, rather, to the proper allocation of a particular function—adjudication of claimed violations of Title VII—that Congress has assigned elsewhere." *Id.* at 71-72 n. 25.

Northwest's reliance upon *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), and other decisions in which unions have been held jointly liable along with employers under Title VII,[71] and its references to statements in the legislative history reflecting an intention to reach union dis-

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[69] *Cf. Piper*, 430 U.S. at 37 ("a party whose previously unregulated conduct was purposefully brought under federal control by the statute . . . can scarcely lay claim to the status of 'beneficiary' whom Congress considered in need of protection."); *see Lank* v. *New York Stock Exchange*, 548 F.2d 61, 65-66 (2d Cir. 1977).

[70] *See, e.g., United Air Lines* v. *Evans*, 431 U.S. 553 (1977); *Mohasco, supra*, 100 S.Ct. 2486.

[71] *See* cases cited at p. 20 n.16 of Northwest's brief.

crimination,[72] are therefore misplaced. The issue is not whether union conduct is covered by Title VII, but how that coverage is to be implemented. The unions herein have been deprived of any opportunity to conciliate the underlying claims of discrimination. Thus, recognition of Northwest's claim would directly contravene the explicit scheme "that Congress provided for that purpose," *Emporium Capwell,* 420 U.S. at 71-72 n.25, depriving the unions of the explicit statutory requirement that all respondents be provided an opportunity for conciliation before suit. It would require the court "to override a host of consciously made decisions well within the exclusive competence of the Legislature." *Id.* at 73. Nothing in *Albemarle* supports such a result.[73]

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[72] *See* Northwest's brief, pp. 17-19, and n.11-15. The focus of the legislative references cited by Northwest was on situations in which unions discriminated by excluding minorities from membership, or by foreclosing employment opportunities through control of a hiring hall, and not on collective bargaining activities.

[73] Both the employer and the local union in *Albemarle* had been named in EEOC charges, and were found to have violated Title VII in a suit brought by aggrieved persons; all claims against the international union were dismissed because it had never been named in an EEOC charge. 271 F.Supp. 27, 29 (E.D.N.C. 1967). Similarly, in the other joint-liability cases cited by Northwest (NWA brief, p. 20 n.16 and Court of Appeals decisions at p. 39 n.28), both the employers and the unions had been charged before the EEOC in advance of suit. *See also EEOC* v. *Air Line Pilots Association, supra,* 489 F.Supp. 1003.

The district court "contribution" decisions cited by Northwest (NWA brief, p. 39 n.28), do not establish any right to contribution. Indeed, *Communications Workers* v. *Illinois Bell Telephone Co.,* 12 E.P.D. ¶11,275 (N.D.Ill. 1976), holds that there is no common law right to Title VII contribution, a conclusion also reached by two decisions Northwest fails to cite. *Younger* v. *Glamorgan Pipe & Foundry Co.,* 418 F. Supp. 743 (W.D.Va. 1976), *vacated on other grounds,* 561 F.2d 563 (4th Cir. 1977), and *Harden* v. *Illinois Bell Telephone Co.,* 74 C 1505 (N.D.Ill. April 8, 1975) (unreported decision, previously annexed to Court of Appeals brief).

The Fifth Circuit, in its recent decision in *Wilson P. Abraham Construction* v. *Texas Industries, supra,* 604 F.2d 897, denying

The Court has denied any remedy where the scheme of Title VII has not been strictly followed even where the aggrieved individual has been subjected to discriminatory treatment. *United Air Lines, Inc. v. Evans, supra,* 431 U.S. 553; *Mohasco, supra,* 100 S.Ct. 2486. While the denial of relief in such situations neither deters future Title VII wrongdoing nor "spur[s] . . . employers and unions to self-examine and to self-evaluate their employment practices," *Albemarle Paper,* 422 U.S. at 417-18, it nevertheless is the result which Title VII requires.

Title VII's explicit enforcement scheme is incompatible with judicial creation of extra-statutory rights and remedies for the benefit of Title VII wrongdoers. A supplemental enforcement procedure, like contribution, cannot be fashioned simply because one violator believes the scheme Congress has chosen is unfair or ineffective:

> "We must respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." *Mohasco,* 100 S.Ct. at 2497.[74]

Northwest's claim simply cannot be squared with the exclusive statutory scheme, and accordingly must be dismissed.[75]

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contribution for antitrust liabilities, refused to accord any weight to the district court Title VII "contribution" cases:

> "The cases decided under the Civil Rights Act do not even discuss the rationales for allowing contribution. We decline to discard an established rule of law by relying on cases that offer no reasons." 604 F.2d at 903.

[74] The majority decision in *Glus II, supra,* 23 FEP Cases 86, while correctly turning to Title VII to determine whether a right to Title VII contribution could be recognized, inexplicably failed to consider the exclusive statutory scheme for establishing such liability.

[75] Even under Northwest's open-ended view of the remedial powers of the Court, a right of contribution cannot be recognized

D. *The District Court Lacks Jurisdiction Over Northwest's Claim for Contribution for Its Title VII Liability Against Defendants That Have Not Been Charged With Discrimination Before the EEOC.*

Northwest seeks a judgment that the unions violated Title VII and are liable for back pay to remedy such violations.[76] Because the unions were never charged with discrimination before the EEOC, the court lacks jurisdiction to entertain this claim.

1. The Filing of an EEOC Charge Is an Absolute Jurisdictional Requirement.

This Court has consistently held that jurisdiction over claims of Title VII violations only exists where suit has been preceded by (1) the filing of a timely charge of discrimination *and* (2) timely filing of suit after receipt of a notice of right to sue from the EEOC.[77] Thus, where Title VII claims are asserted against an employer and a union, but only the employer has been charged, all Title VII claims against the union must be dismissed.[78] These re-

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unless it "is consistent with the federal law creating the underlying liability." NWA brief, p. 13.

[76] J.A. 19-20 (¶11), 21 (¶14).

[77] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 47 (the statute "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit"); *United Air Lines* v. *Evans*, 431 U.S. at 555 n.4; *Int'l Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 239-40 (1976); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973).

While some lower courts have construed the time limits for filing EEOC charges to be statutes of limitations rather than jurisdictional requirements, *compare, e.g., Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975) *with Verzosa* v. *Merrill Lynch, Pierce, Fenner & Smith*, 589 F.2d 974 (9th Cir. 1978), no court has held that the requirement *per se* that a charge be filed prior to suit is anything less than absolute and jurisdictional.

[78] *See, e.g., Miller* v. *International Paper Co.*, 408 F.2d 283, 285 (5th Cir. 1969); *Sabala* v. *Western Gillette, Inc.*, 516 F.2d 1251,

sults are mandated by Congress' decision to require initial reference of all claims to the EEOC.[79]

2. Title VII's Jurisdictional Prerequisites Bar Northwest's Contribution Claim.

Northwest seeks to avoid the jurisdictional requirements of Title VII by "asserting a federal common law right of contribution, not a discrimination claim under Title VII itself" (NWA brief, p. 51), and basing jurisdiction on 28 U.S.C. § 1331.[80] However, the "federal common

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1254 (5th Cir. 1975), *vacated on other grounds,* 431 U.S. 951 (1977); *Williams* v. *General Foods Corp.,* 492 F.2d 399, 405 (7th Cir. 1974); *Crawford* v. *Western Electric Co.,* 614 F.2d 1300 (5th Cir. 1980); *Cutliff* v. *Greyhound Lines, Inc.,* 558 F.2d 803 (5th Cir. 1977); *Wiggins* v. *Spector Freight Systems, Inc.,* 583 F.2d 882, 884 (6th Cir. 1978).

The same result is reached under the National Labor Relations Act ("NLRA"), which as Northwest recognizes (NWA brief, p. 17) served as the model for the remedial scheme of Title VII. Under the NLRA, the party charged before the NLRB, whether employer or union, is liable for *all* of the injuries resulting from an unfair labor practice, even where the unlawful conduct flows from the provisions of a collective bargaining agreement. *Compare Radio Officers Union* v. *NLRB,* 347 U.S. 17, 34-35, 47 (1954) [*Gaynor News* v. *NLRB*] *and NLRB* v. *Vernitron Electrical Components, Inc.,* 548 F.2d 24, 27 (1st Cir. 1977) (only employer liable) *with NLRB* v. *Local 776, IATSE (Film Editors),* 303 F.2d 513, 516 n.2 (9th Cir.) *cert. denied,* 371 U.S. 826 (1962) (only union liable). Liability can only be apportioned among jointly-charged parties. *NLRB* v. *Puerto Rico S.S. Ass'n,* 211 F.2d 274, 276-77 (1st Cir. 1954). All of the Title VII "apportionment cases" cited by Northwest (NWA brief, p. 41 and n.30) similarly involve jointly-charged parties.

[79] *Accord, Beverly* v. *Lone Star Lead Construction Corp.,* 437 F.2d 1136, 1139 (5th Cir. 1971) (all respondents must be afforded "at least an *opportunity* to reach a more amicable conciliation out of court. . . . The purpose of the Act would indeed be frustrated if the Commission could be avoided entirely. . . .") ; *Stebbins* v. *Continental Insurance Cos.,* 442 F.2d 843, 845-46 (D.C.Cir. 1971).

[80] Northwest also asserts that the district court below held that jurisdiction lies in this case on the basis of diversity. NWA brief, p. 52 n.37. The District Court subsequently corrected its error, deleting its earlier footnote on diversity jurisdiction (J.A. 46).

law" only serves as a "law of the United States" [81] within the scope of 28 U.S.C. § 1331 in the limited instances where the right asserted is based on duties derived from the common law itself. *See, e.g., Illinois* v. *Milwaukee,* 406 U.S. at 103. Where, as here, a claim invokes statutory obligations, the claim "arises," for jurisdictional purposes, under that statute, not the "federal common law." [82]

Any limitations upon jurisdiction which are found in the statute under which the claim arises bar resort to general jurisdictional grants, such as those embodied in 28 U.S.C. §§ 1331 and 1337.[83] Such statutory jurisdictional limitations cannot be avoided through artful pleading of alternative sources of substantive rights, if the substance of the claim involves the enforcement of duties created by the statute. *Weinberger* v. *Salfi,* 422 U.S. 749 (1975). *Accord,*

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[81] The pertinent part of 28 U.S.C. § 1331 reads:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States. . . ."

[82] *See Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76,* 323 U.S. 210, 213 (1944) (claim asserting breach of union's "federal common law" duty of fair representation is derived from and "arises under" the Railway Labor Act for jurisdictional purposes); *Avco Corp.* v. *Aero Lodge No. 735, IAM,* 390 U.S. 557, 561-62 (1968) (claim requiring courts to fashion "common law" to enforce agreements under Section 301 of the LMRA, 29 U.S.C. § 185, arises under that "Act of Congress" for purposes of 28 U.S.C. §1337, not the common law).

Northwest's reliance on *Johnson* v. *Railway Express Agency, Inc., supra,* 421 U.S. 454 (NWA brief, p. 51), is misplaced. The claim there asserted a violation of 42 U.S.C. §1981; therefore Title VII's jurisdictional prerequisites were inapplicable. By contrast, Northwest's claim lacks an independent statutory source of rights.

[83] *See, e.g., General Committee of Adjustment of Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R. Co.,* 320 U.S. 323 (1943), where the Court declined to apply general federal question jurisdiction "in enforcement of an obligation which it is claimed Congress has created," *id.* at 333, because Congress had left the dispute to voluntary resolution by conciliation, mediation and arbitration. *See also Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 300-01 (1943).

Glus v. *G.C. Murphy Co.*, 562 F.2d 880 (3d Cir. 1977) ("Glus I").[84]

In *Weinberger* v. *Salfi*, the Court held that claimants seeking benefits under the Social Security Act could not avoid that Act's jurisdictional limitations by invoking jurisdiction under 28 U.S.C. § 1331 through characterization of their claim as a deprivation of constitutional rights. Similarly, Northwest cannot invoke § 1331 jurisdiction in an action to establish another party's Title VII liability. The EEOC charge is "[t]he key to the courthouse door." *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 30 (5th Cir. 1968). To allow Northwest to proceed in the absence of any charge against the unions "'would be to judicially admit at the back door that which has been legislatively turned away at the front door.'" *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977), *quoting Laird* v. *Nelms*, 406 U.S. 797, 802 (1972).

Just as Congress has provided a right of contribution in some statutes, but not others,[85] it has also eliminated statutory jurisdictional limitations for third party claims where it considered doing so appropriate.[86] Contrary to Northwest's suggestion (NWA brief, p. 52), courts cannot

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[84] In *Glus I*, the Court held that Title VII's jurisdictional prerequisites apply to employer contribution claims. In *Glus II*, the Court considered, but did not decide, whether 28 U.S.C. §1331 could serve as a separate basis of subject matter jurisdiction. 23 FEP Cases at 88 n.1.

None of the other Title VII "contribution cases" cited by Northwest (NWA brief, p. 39 n.28) rested jurisdiction on 28 U.S.C. §1331.

[85] *See* discussion at II-A, *supra*.

[86] The Federal Tort Claims Act bars actions based on tort claims against the United States that have not previously been submitted to the appropriate Federal agency. 28 U.S.C. §2675(a). This prerequisite is jurisdictional. *E.g.*, *Employees Welfare Committee* v. *Daws*, 599 F.2d 1375 (5th Cir. 1979). However, the statute expressly eliminates the requirement for contribution actions: "The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim." 28 U.S.C. §2675(a).

create exceptions to meet the exigencies of a particular case.[87] The absence of a charge against the unions is an absolute bar to Northwest's claim for contribution for Title VII liability.[88]

E. *Policy Considerations Do Not Support Contribution for Title VII or EPA Liability.*

Contrary to Northwest's suggestions, a right to contribution for its Title VII and Equal Pay Act liability cannot be judicially established simply as a matter of "fairness" or policy. The courts "are not at liberty to legislate." *Touche*

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[87] Unlike "procedural defenses" or statutes of limitations, which may be waived by the conduct or consent of the parties, a jurisdictional limitation cannot be modified for reasons of "fairness" or judicial policy. *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951). Thus, Northwest's lack of standing to file an EEOC charge (NWA brief, p. 51) does not allow avoidance of the jurisdictional requirements. *See also Snyder* v. *Harris*, 394 U.S. 332, 341-42 (1969) ("If there is a present need to expand the jurisdiction of [federal] courts we cannot overlook the fact that the Constitution specifically vests that power in the Congress, not in the courts.").

[88] The exclusive nature of Title VII's remedial scheme precludes the determination of ALPA's asserted Title VII liability, even if it were determined that jurisdiction existed under §1331. *See Southbridge Plastics Div., W. R. Grace & Co.* v. *Local 759, Int'l Union of Rubber Workers*, 565 F.2d 913 (5th Cir. 1978) (issues of Title VII liability cannot be determined in the absence of an EEOC charge against the union in an action under §301 of the LMRA). *Cf. Yakus* v. *United States*, 321 U.S. 414, 434-35, 444-46 (1944) (jurisdiction over criminal prosecution for violation of maximum price regulation, but not over defense that regulation was invalid); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 775 (1952) (jurisdiction over duty of fair representation claims, but not over questions involving craft or class determinations).

Any substantive defense which the party from whom contribution is sought would have against the original plaintiff can similarly be asserted against the contribution plaintiff. Restatement (Second) Torts §886A, Comment (g) (1979); W. Prosser, The Law of Torts, §50, ¶5, p. 309 (4th ed. 1971). Since the absence of a charge against the unions would bar any effort by the *Laffey* plaintiffs to establish their Title VII liability, it similarly bars any effort to establish this Title VII liability through contribution.

Ross, 442 U.S. at 579. Congress alone "has the power and judgment to pick and choose among its statutes" [89] to determine where contribution would or would not be appropriate.[90]

Each of Northwest's policy arguments are subject to substantial countervailing considerations. The validity of the underlying assumptions and the potential impact of contribution upon diverse interests can only be determined by "the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Diamond* v. *Chakrabarty*, 100 S.Ct. 2204, 2212 (1980).[91] Where, as here, "the claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position" and "presents questions of policy upon which Congress had not spoken," it cannot be judicially created. *United States* v. *Gilman*, 347 U.S. 507, 511 (1954).

1. A Right of Contribution Will Not Deter Violations of Title VII and the EPA.

Northwest principally relies on the deterrent value of contribution, asserted to provide a "spur or catalyst" to unions to eliminate employment discrimination. NWA brief, p. 34. Some courts have agreed.[92] Others have concluded that the unavailability of contribution serves as a stronger deterrent, since a party risks full liability if it violates the law.[93]

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[89] *Alyeska Pipeline Service*, 421 U.S. at 263.

[90] *See, e.g., Mohasco*, 100 S.Ct. at 2497.

[91] *See TVA* v. *Hill*, 437 U.S. 153, 194-95 (1978).

[92] *Glus II*, 23 FEP Cases at 91-92; *but see* Sloviter, J., dissent, 23 FEP Cases at 100-01; Professional Beauty Supply, 594 F.2d at 1185; *but see* Hanson, J., dissent, 594 F.2d at 1189.

[93] *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. at 1061; *EEOC* v. *Ferris State College*, 23 FEP Cases at 441; *Carriers Insurance Exchange* v. *Truck Insurance Exchange*, 310 F.2d at 658; *Sabre Shipping Corp.* v. *American President Lines*, 298 F. Supp. at 1346; *Mataya* v. *Behm Motors*, 409 F. Supp. at 70. *Cf. Radio*

In any event, the alleged deterrent effect of contribution does not provide a basis for judicial recognition of contribution, for as the Court recently concluded in *Piper*, 430 U.S. at 39-40: "The deterrent value, if any, of such [damages] awards can never be ascertained with precision."

2. Recognition of a Right of Contribution Would Discourage Enforcement of Title VII and the EPA by Aggrieved Employees.

Title VII and the EPA authorize and encourage aggrieved individuals to act as "private attorneys general" to correct violations of those acts. *See Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 418 (1978). The statutes, as written, grant aggrieved employees prosecutorial discretion in choosing whom to sue.[94] Contribution would override that discretion and discourage enforcement.

Because unions are non-profit associations funded by member dues, contribution "would only serve to penalize the employees themselves, whose dues comprise the funds out of which the contribution payments would be made." *EEOC* v. *Ferris State College*, 23 FEP Cases at 441. Consequently, if contribution is permitted, the aggrieved employees will be made less than whole for the harm they have suffered, in derogation of the principles underlying Title VII and the EPA. *See Albemarle Paper*, 422 U.S. 418-19. Such a result "is hardly conducive to enforcement of the Act." *Brennan* v. *Emerald Renovators*, 410 F. Supp. at 1061.

Officers v. *NLRB*, 347 U.S. at 54 (to hold the party named in an administrative charge fully liable, and allow the uncharged party to escape liability entirely, does not "frustrate the [National Labor Relations] Act's purposes."

[94] This approach is patterned after the National Labor Relations Act, where "the choice of respondent or respondents lies with the person aggrieved and an employee who is illegally discriminated against by joint action of the union and the employer, may name as respondent, either the union or the employer or both." *NLRB* v. *Local 57, Int'l Union of Operating Engineers*, 201 F.2d 771, 774 (1st Cir. 1953).

These adverse consequences of contribution exist regardless of the size or wealth of the union. NWA brief, p. 44.[95] Where the amounts are of the magnitude at issue here, conservatively asserted by Northwest to total $37,000,000 (NWA brief, p. 6), the impact will be devastating, no matter how "wealthy" the union. It is one thing for aggrieved employees to weigh the consequences of substantial back pay awards upon their union, and nonetheless to elect to assert claims against it, but quite another to allow their discriminatory employers to force them to accept these consequences as the price for pursuing their rights under Title VII and the EPA.[96]

Northwest's speculative assertions as to possible employee-union "collusion" (NWA brief, pp. 35-36) do not justify overruling the employee's choice of respondent.[97] Title VII remedies are equitable. If the plaintiff's collusive activities constituted "unclean hands," the court could consider such conduct in its fashioning of relief.[98] Alternatively, a charged employer could bring employee-union

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[95] Northwest's reference to union "receipts" (NWA brief, p. 44 n.31) is misleading because the most substantial portion of these "receipts" is derived from the investment and reinvestment of the same basic fund during the year.

[96] The Court recently counselled in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979), against imposing damages which "could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area."

[97] A concern with possible "collusion" does not apply in this case. Northwest does not allege any conduct which would even remotely suggest "collusion" between the *Laffey* plaintiffs and the unions. Moreover, despite the fact that the unions were not present in *Laffey* to defend against any charges made by Northwest, the findings of the District Court contain no indication of "collusion" in plaintiffs' decision not to seek back pay from the unions.

[98] For example, if a plaintiff has engaged in laches in pursuit of a Title VII claim, that can affect entitlement to relief. *See, e.g., Albemarle Paper*, 422 U.S. at 424.

"collusion" to the attention of the EEOC and request it to file its own charge against the uncharged union.[99]

3. Contribution Would Discourage Affirmative Action by Unions.

3. Title VII and the EPA encourage affirmative action by unions to remedy employer discrimination.[100] An important means of affirmative action is the commencement of Title VII actions by unions on behalf of the employees they represent.[101] Such union affirmative conduct will be deterred by employer contribution claims. Whether or not these claims are successful, their defense will undoubtedly be costly and will divert at least a portion of the union's limited resources from the pursuit of affirmative goals, to the detriment of the statutes' "intended beneficiaries."

4. Contribution Would Discourage Settlement of Title VII and EPA Cases.

As discussed above, Congress selected conciliation and settlement, rather than litigation, as the preferred means for enforcing the requirements of the fair employment statutes. *Alexander* v. *Gardner-Denver*, 415 U.S. at 44. The incentive for settlement is lessened, if not entirely removed, if a party knows that even if it agrees to settle a claim of discrimination, it faces a possible future claim for contribution by a party subsequently held liable to the aggrieved person.[102]

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[99] As discussed above at p. 28, *supra*, Congress expressly chose this "solution" for the "collusion" problem.

[100] *See* "Resolution to Encourage Voluntary Affirmative Action," issued by the EEOC, April 1, 1980, 48 U.S.L.W. 2660.

[101] ALPA has pursued this avenue of affirmative action on many occasions. *See, e.g.*, *ALPA* v. *United Air Lines, Inc.*, 480 F. Supp. 1107 (E.D.N.Y. 1979); *ALPA* v. *Ozark Air Lines*, 10 FEP Cases 463 (N.D.Ill. 1975); *ALPA* v. *Continental Air Lines*, 10 FEP Cases 462 (N.D.Ill. 1974).

[102] *See Sabre Shipping*, 298 F. Supp. at 1346; *cf. Rogers* v. *Exxon Research & Engineering*, 550 F.2d at 841 (compensatory damages

5. Title VII's Guarantees of Fair Treatment to All Respondents Would Be Undermined by Recognition of a Contribution Claim in This Action.

As part of the "compromise" which produced Title VII,[103] Congress adopted certain provisions to assure fair treatment to potential respondents, employers and unions alike. Foremost was its decision to provide every party accused of Title VII wrongdoing the opportunity to conciliate before being sued. This approach reflects a "concern expressed in Congress that due process safeguards be built into the statutory scheme of Title VII" and manifests "a concern for the fair treatment" of respondents. *EEOC* v. *Bailey Co., Inc.*, 563 F.2d 439, 450 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

A contribution claim, as presented in this action, would strip the unions of these statutory protections. They would be denied any opportunity to conciliate the underlying discrimination claim.[104] Moreover, the unions would have to defend as to matters already adjudicated, without the benefit of discovery, cross-examination of witnesses, or an opportunity to challenge the evidence in the underlying Title VII action. These consequences would also be experienced by any union or employer that had been sued in a Title VII action and been subsequently dismissed as a party. The prejudice inherent in these results is clear and irreparable.

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would discourage conciliation under the Age Discrimination in Employment Act).

[103] *Mohasco*, 100 S.Ct. at 2493.

[104] Northwest was named in an EEOC charge before *Laffey* was instituted, and thus was afforded the "opportunity" for conciliation. That actual conciliation efforts did not occur is beside the point. The statute requires that any respondent be afforded the opportunity to conciliate before it is sued. The charge provides that opportunity. Mandatory initial referral of a claim to the EEOC to trigger "[t]he conciliation process is one of the unique and key features which helps make Title VII fair to both plaintiffs and defendants." *Wallace* v. *Int'l Paper Co.*, 426 F. Supp. 352, 357 (W.D. La. 1977).

6. Contribution Would Conflict With Title VII's Requirement That Claims of Title VII Violations Be Promptly Asserted.

The Court of Appeals, in declining to address the merits of the Title VII contribution claim, emphasized the importance in the statutory scheme of prompt submission of claims of discrimination, and remanded to the District Court for a determination as to whether Northwest's claim was barred by laches. (P.A., pp. 12d-13d). The statute's requirement of prompt processing of all discrimination claims is a further protection Congress provided to assure fair treatment to all potential respondents. It reflects a "judgment . . . that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco,* 100 S.Ct. at 2494.[105]

Contribution would directly override that congressional judgment, especially where the filing of a contribution claim provides the first notice to the contribution defendant of any asserted Title VII violations on its part. The substantial prejudice to the contribution defendant is graphically reflected by the undisputed facts in *Laffey* and the instant suit which reveal a conscious litigation strategy by

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[105] *See also Int'l Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. at 240 and n.14. "Congress did express concern for the need of time limitations in the fair operation of the Act. . . ." *Occidental Life Ins. Co.* v. *EEOC,* 432 U.S. at 371. In recognition of this congressional concern, the laches of an aggrieved person in pursuing a claim of discrimination may bar or affect the relief it seeks. *See, e.g., Albemarle Paper Co.*, 422 U.S. at 424. Similar considerations should apply to laches in assertion of contribution claims. *Cf. Avondale Shipyard, Inc.* v. *Vessel Thomas E. Cuffe,* 434 F. Supp. 920, 934-35 (E.D. La. 1977) (court dismissed a contribution claim for laches where a party's unreasonable delay caused prejudice to the contribution defendant, even though the underlying liability as to which contribution had been sought had not yet been determined). *Accord, Hartford Fire Ins. Co.* v. *Callanan Marine Corp.*, 398 F. Supp. 436 (S.D.N.Y. 1973). *See also Long Island Railroad* v. *New York Central No. 25,* 182 F. Supp. 100, 105 (S.D.N.Y. 1960).

Northwest to delay the assertion of any Title VII claim against the unions until such time as they have been prejudiced in their defense to such allegations.[106]

Laffey was commenced in 1970. Northwest made no attempt to join either TWU or ALPA as defendants. Even after ALPA was joined in mid-1972, at the instance of *plaintiffs* for specific, limited purposes,[107] Northwest continued its strategy of silence. If Northwest had asserted its contribution claim at the outset,[108] the unions would have been in a position to proceed as full participants in pretrial discovery and trial,[109] well in advance of any determination of the underlying *Laffey* liabilities. Instead, Northwest waited "almost four years after the action was commenced, more than three years after NWA had answered the complaint . . . and . . . several months after the court rendered its findings and judgment," 567 F.2d at 477, to amend its answer to assert a cross-claim for contribution or indemnity against ALPA. *Id.* at 476.

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[106] At oral argument before the Court of Appeals below, Northwest counsel acknowledged that this prolonged delay in proceeding against the unions was a matter of conscious litigation strategy. (Copies of relevant pages from the transcript are set forth in Supplemental Appendix B, annexed hereto.) *See Organizations United for Ecology* v. *Bell*, 446 F. Supp. 535, 547 (M.D.Pa. 1978).

[107] The *Laffey* plaintiffs "moved to join ALPA as a party 'solely for the limited purpose of assuring that the court will have before it all the parties necessary to effectuate relief,' noting explicitly that they 'do not contend that ALPA has in any respect violated' the law. Since they deemed ALPA 'not responsible for any of the discrimination' alleged, they did not seek to join ALPA as a defendant." 567 F.2d at 477-78.

[108] ALPA maintains that any such claim would have been subject to dismissal for the same reasons presented herein.

[109] Indeed, the Court could have stayed the action 60 days to provide an opportunity for conciliation before the EEOC of any claims against the unions. Section 706(f)(1), 42 U.S.C. §2000e-5(f)(1). While this would not have provided the opportunity for conciliation *before suit* which the statute requires, it at least, as a practical matter, would have made conciliation possible before formal proceedings could have been further pursued.

The prejudice from this delay appears on the face of the complaint: Northwest seeks to apply the *Laffey* findings as the predicate for the "common liability" element of its contribution claim.[110] Although these findings cannot bind parties not in privity with the *Laffey* parties, the burden on ALPA to demonstrate that no violation of Title VII occurred, given the *Laffey* determination, is, to say the least, considerable. These consequences demonstrate the incompatibility of contribution with congressional concern for prompt processing of claims of discrimination.

F. *Contribution for Title VII and EPA Liability Cannot Be Predicated on Any Other Sources of Liability.*

Northwest, apparently recognizing that it cannot overcome the considerable hurdles to contribution under Title VII or the EPA, now asserts that an alternative basis for contribution exists based upon an alleged breach by the unions of their Railway Labor Act duty of fair representation to the *Laffey* plaintiffs. Such a claim was neither pleaded in the complaint, nor raised below, and accordingly, is not properly presented to this Court. Furthermore, the attempt to assert an additional basis for Northwest's contribution claim does not cure its deficiencies.

Northwest seeks to have the unions contribute to its liability in *Laffey* which arose under only two sources—Title VII and the EPA.[111] It would entirely subvert Congressional intent to allow Northwest to bypass the bars to contribution in those statutes by invoking another source of possible liability.[112] It would also encourage widespread

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[110] J.A. 18-21 (¶¶7, 11, 13, 15-16).

[111] J.A. 18 (¶17), 19-20 (¶¶11, 13).

[112] *Cf. Transamerica*, 444 U.S. at 24 n.14 (a party cannot seize on an alternative theory to secure relief which Congress did not confer). Where contribution has specifically been provided in the Securities Acts, a party cannot bypass the statutory limitation of

efforts by litigants to avoid statutory restrictions on claims by simply couching their claims as "common law" rights. Northwest has cited no contribution case, state or federal, which has permitted contribution to a party whose liability arose under a statute which compels that contribution be rejected.

Any right of contribution for liabilities under the Railway Labor Act would have to be determined under that statute. The substantive standards imposed for breach of the duty of fair representation are distinct from those imposed by the EPA and Title VII;[113] the respective liabilities are not "common."[114]

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contribution available only against fraudulent wrongdoers, by resorting to alternative theories of liability. *deHaas* v. *Empire Petroleum Company*, 286 F. Supp. 809, 816 n.10 (D.Colo. 1968), *aff'd in part and vacated in part*, 435 F.2d 1223 (10th Cir. 1970). It would be totally anomalous to allow a broader judicial right of contribution for statutory liabilities where Congress has not provided for contribution than in the limited instances where Congress has so provided.

[113] A union is accorded a "wide range of reasonableness" in its negotiation of collective bargaining agreements, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953), and does not breach its duty of fair representation in drawing distinctions among members if it acts with "good faith and honesty of purpose." *Id. See also Humphrey* v. *Moore*, 375 U.S. 335, 349-50 (1964). In contrast, a defendant's "good faith" may not insulate it against claims of Title VII or EPA wrongdoing. *See, e.g., Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971); *Laffey*, 567 F.2d at 455. Accordingly, as one of the cases upon which Northwest purports to rely points out, *Stevenson* v. *International Paper Co.*, 432 F. Supp. 390, 408 (W.D.La. 1977), a union's conduct may violate Title VII, but not breach the duty of fair representation. *See, e.g., Peters* v. *Missouri Pacific R. Co.*, 483 F.2d 490, 496-97 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); *Taylor* v. *Armco Steel Corp.*, 373 F. Supp. 885, 890 (S.D.Tex. 1973); *Norman* v. *Missouri Pacific R.R. Co.*, 414 F.2d 73 (8th Cir. 1973); *Tipler* v. *E.I. duPont deNemours & Co., supra*, 443 F.2d 73. *Chrapliwy* v. *Uniroyal, Inc.*, 458 F. Supp. 252 (N.D.Ind. 1977), erroneously fails to recognize these distinctions.

The findings in *Laffey*, while developed without the unions as litigants, nevertheless acknowledge the reasonableness of union conduct. 567 F.2d at 447.

[114] The cases which Northwest cites do not support its assertion that "contribution has been permitted" where an employer's liabil-

While any determination of a right to contribution under the Railway Labor Act must await a case in which that statute's obligation are at issue, there are clear indications that such a claim would be rejected. Courts construing the Railway Labor Act have found that the absence of any provision in the statute for damages for employers, even where they are directly harmed by a breach of statutory obligations, requires the rejection of an implied damage remedy in favor of employers.[115] It is far less likely that a right to employer damages would be recognized where the statutory harm, if any, is to employees, and not employers. In addition, it cannot be argued that contribution is "necessary" to effectuate the duty of fair representation, where, as here, the compensatory purposes of the duty[116] have been satisfied by provision of full relief to the aggrieved employees.

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ity was under the EPA or Title VII and the union's was under the duty of fair representation. NWA brief, p. 34 n.25.

No contribution claim was presented in *Farmer* v. *United Catering Workers Local 1064*, 19 E.P.D. ¶9075 (E.D.Mich. 1979). *Communication Workers* v. *Illinois Bell Telephone Co., supra*, 12 E.P.D. ¶11,275, only declined to dismiss an employer's counterclaim to the union's affirmative Title VII action, and *Stevenson* v. *Int'l Paper Co., supra*, as indicated, noted the difference between the standards of proof involved for fair representation and Title VII claims. In addition, the substantive unreported decision of the District Court in *Glus* v. *G. C. Murphy Co.* (April 29, 1976) (an earlier decision of which is cited at NWA brief, p. 32 n.23), held that "common liability" did not exist over fair representation and Title VII claims.

[115] *Louisville & Nashville R.R.* v. *Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958); *National Airlines, Inc.* v. *Air Line Pilots Association, Int'l*, 431 F. Supp. 53, 54 (S.D.Fla. 1976).

[116] *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. at 48-49.

CONCLUSION

For the above reasons, that part of the judgment of the Court of Appeals pertaining to contribution for Equal Pay Act liability should be affirmed; that part of the judgment pertaining to contribution for Title VII liability should be vacated, and remanded with directions to dismiss. Alternatively, the judgment of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX A

Pertinent Statutory Provisions

Fair Labor Standards Act:

29 U.S.C. § 203 Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Title VII, Civil Rights Act of 1964, as amended:

Section 706, 42 U.S.C. § 2000e-5

* * *

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days and shall make an investigation thereof. Charges shall be in writing

under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from

such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

* * *

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . .

(f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The

person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . . Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

SUPPLEMENTAL APPENDIX B

Excerpts From Transcript of Oral Argument Before Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 78-1056
No. 78-1098
No. 78-1141

NORTHWEST AIRLINES, INC.,

Appellee and Cross-Appellant,

v.

TRANSPORT WORKERS UNION OF AMERICA and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Appellants and Cross-Appellees.

Washington, D.C.,
Wednesday, January 24, 1979.

The above-entitled matters came on for oral argument at 9:30 o'clock a.m.

BEFORE:

CHIEF JUDGE WRIGHT, CIRCUIT JUDGE ROBINSON, and DISTRICT JUDGE CHARLES RICHEY.

Supplemental Appendix B

APPEARANCES:

STEPHEN B. MOLDOF, ESQ., Cohen, Weiss and Simon, 605 Third Avenue, New York, New York 10016; on behalf of the Appellant/Cross-Appellee, Air Line Pilots Association.

ASHER SCHWARTZ, ESQ., O'Donnell & Schwartz, 285 Madison Avenue, New York, New York 10017; on behalf of Appellant/Cross-Appellee, Transport Workers Union of America.

HENRY HALLADAY, ESQ., Dorsey, Windhorst, Hannaford, Whitney & Halladay, 2300 First National Bank Building, Minneapolis, Minnesota 55402; on behalf of Cross-Appellee/Appellant, Northwest Airlines.

MR. HALLADAY:

• • •

(page 19 of transcript)

Now, responding again to Chief Judge Wright's inquiry, a decision was made at the time not to attempt to bring

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these unions into the case on the thesis that the rules did not make a third-party claim compulsory, and on the additional basis, Your Honor, which we met when we finally did try to bring the unions into the case, that the claim was not yet ripe, that it had not matured, and that the conditions precedent to bringing these two unions to the bar was the actual payment by Northwest under the traditional contribution rule that you can't bring a joint tortfeasor to brook until the tortfeasor in question held liable has paid more then its allocable share of that liability.

So, Your Honor, I don't seek forgiveness but I do render this a rational explanation of the procedural complexities which bring us before this Court in 1979 when in all fairness I would much prefer to have been here long, long since

and to thresh out the basic question of the policy of these statutes that cannot be taken to be meaningless but which says that the obligations to eradicate this last ignominious page from our history rests not just on employers but equally on unions.

QUESTION: There is no question about that. The statute makes that clear.

MR. HALLADAY: If the—

QUESTION: (inaudible)

MR. HALLADAY: If the statute makes it clear, Your Honor, and if it was not intended as something that was purely

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trekatory at the hands of Congress, and none of us can conceivably believe that, then the answer is to reverse the trial judge on his ruling under the Equal Pay Act and to affirm him on his ruling on Title VII and let us get to trial on this case which we have been urging and urging and urging ever since it was commenced. And there has been delay, Your Honor, in the prosecution of this particular case which I say in all honesty to this Court, delay has not been attributable to any foot-dragging on the part of Northwest Airlines or myself.

QUESTION: (inaudible)

MR. HALLADAY: No question about that, Your Honor. I couldn't agree more. I say, as a member of the bar of this Court, that there was a decision made at the time for strategic and procedural and meritorious reasons which then to me seemed to be sufficient, we did not interpret the rules as making it compulsory, as time began to go on we became more and more concerned about the question of time itself; when we finally made the motion that was denied as being too late, when we started the separate law suit again to get the issue up and to try to preserve evidence that was now beginning to disappear in the minds of missing witnesses, we once again were met at the threshhold with the question which took almost a year to get straightened out, that we

Supplemental Appendix B

were again already too soon, premature and couldn't sue.

(page 22 of transcript)

And we finally overcame that hurdle which has become the law of this case, we have a right to bring this declaratory judgment action but now we are met with the contention that eight years ago there was something we should have done which we failed to do, and I say in all fairness, Your Honor, the issues in this case warrant treatment that is not based upon that basis, with all respect to Your Honor.